

Local 735, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (General Motors Corporation) and Thomas G. DeMiro. Case 7-CB-11729

August 16, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN
AND BRAME

On May 7, 1999, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,¹ findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Robert A. Drzyzga, Esq., for the General Counsel.

Michael B. Nicholson, Esq., of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me in Detroit, Michigan, on February 8, 1999, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 7 of the National Labor Relations Board (the Board) on August 25, 1998.¹ The complaint, based on an original and first and second amended charges filed by Thomas G. DeMiro (DeMiro) alleges that Local 735, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the Respondent or Union) has engaged in certain violations of Section 8(b)(1)(A) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that on April 21, Respondent, by its agent Gary O'Neal, at the Ypsilanti Powertrain plant, threatened employees of the General Motors Corporation (the Employer) with physical harm because they did not pay union dues to Respondent. Additionally, on May 1, O'Neal confirmed to

¹ The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

¹ All dates are in 1998 unless otherwise indicated.

an employee of the Employer that the statements made were threats of physical harm.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following²

FINDINGS OF FACT

I. JURISDICTION

The Employer is a corporation engaged in the manufacture and nonretail sale and distribution of automobiles and related products in Detroit, Michigan, with a facility and place of business in Ypsilanti, Michigan, where it annually sold and shipped from its facility located within the State of Michigan goods valued in excess of \$50,000 directly to points outside the State of Michigan. The Respondent admits and I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

In order to put the alleged threats in perspective, the following discussion is necessary. First, it must be noted that DeMiro vigorously contested the Union's right to require him to pay dues and fees under the union-security clause between the Employer and the Union (G.C. Exh. 4), in accordance with his rights as enunciated under the case of *Communications Workers v. Beck*, 487 U.S. 735 (1988). In this regard, DeMiro revoked his dues-checkoff authorization in late 1997, and demanded from the Union sufficient information to enable him to intelligently decide whether to object to paying for union activities not germane to the Union's duties as bargaining agent. The Union apprised DeMiro of his dues obligation and the amount owed for activities related to collective bargaining and administration of the collective-bargaining agreement. During the course of the communication between DeMiro and the Union, he became delinquent in his dues for the period from December 1997 through April 1998. On April 29, the Respondent apprised DeMiro of his total dues arrearage and informed him that any failure to make the payment by June 1, may result in a request to discharge him from his employment with the Employer (R. Exh. 21). Thereafter, on October 2, the Union wrote the Employer and discussed DeMiro's continued delinquency but did not demand that he be discharged because they wanted to be sure that DeMiro fully understood his obligation to pay dues. In fact, at no time prior to or after November 10, when the Union finally received DeMiro's full payment for back dues, has the Union ever requested that DeMiro be discharged for refusing to pay dues.

Second, one of the two employees involved in the conversation with O'Neal on April 21, is Amil Elrod. He has worked for the Employer since 1965 and has been a member of the Union since that time. By letter dated February 16 (G.C. Exh. 7), Elrod appealed the dismissal of an unrelated unfair labor practice charge to the Board's General Counsel in Washington, D.C. He provided copies to the Employer and the Union, and stated that he desired to renounce his membership, revoke his

² The Respondent's motion to correct the transcript, dated March 17, 1999, is granted and received in evidence as R. Exh. 28.

union membership card and cease all union dues deductions. Although the Union and the Employer acknowledge receiving this letter, the Employer never removed Elrod from dues check-off authorization and he continues to pay his dues in this manner. The second employee involved in the April 21 conversation with O'Neal is Darell Maschke. He has worked for the Employer since 1966 and was a member of the Union until March 26, when he resigned and revoked his dues-checkoff authorization. During the course of extensive written communication between Maschke and the Union, Maschke became delinquent in his dues for a short period of time before settling his obligations in full on May 18. At no time during the delinquency period, did the Union ever request the Employer to discharge Maschke for refusing to pay union dues.

B. Gary O'Neal's Status

O'Neal is a long time employee of the Employer who regularly works as an educator and trainer, and as of May 1996, was elected as a trustee of the Union's executive board. The Union stipulated that O'Neal is an agent of the Union for all purposes except in the collection of dues.

The Respondent argues that even if O'Neal made the alleged statements attributed to him in the complaint, that since he is not an agent of the Union for the collection of dues, the statements cannot be imputed to the Union.

It is well established that apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for that party to believe that the principal has authorized the alleged agent to perform the acts in question. See generally *Dentech Corp.*, 294 NLRB 924 (1989), and *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). Thus, in determining whether statements made by individuals to employees are attributable to the employer, the test is whether under all the circumstances, the employees "would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management" *Waterbed World*, 286 NLRB 425, 426-427 (1987).

O'Neal admitted that he knew Elrod and Maschke for approximately 30 years and both employees were aware that O'Neal has been a trustee sitting on the Union's executive board since May 1996. O'Neal is one of seven individuals that comprise the executive board and acts as a conduit for relaying and enforcing the Respondent's decisions, directions, policies, and views. I conclude that given the position in which the Respondent has entrusted O'Neal, it was reasonable for Elrod and Maschke to believe that any statements made by O'Neal that involved the collection and non payment of union dues were uttered with the full authority of the Union. Thus, I find in the particular circumstances of this case, that O'Neal is an agent of Respondent within the meaning of Section 2(13) of the Act and if he made any unlawful statements, it can be imputed to the Union.

C. The Facts

Amil Elrod testified that on April 21, around 6:10 a.m. on his way to a job assignment, Gary O'Neal advised him "Better watch your back." Elrod replied, "What do you mean?" and O'Neal said, "They are out to get you." O'Neal then told Elrod to get back with him later.

Around 9:10 a.m. on the same day, O'Neal and Elrod met on the workfloor along with employee Darell Maschke. When Elrod asked what he meant by the statement, "Better watch

your back," and asked, "Is their someone out to hurt me?" O'Neal said, "Be very careful because they have a special committee set up by a financial group known as the Pontiac Group." O'Neal explained that the Pontiac group was established through a financial group originally set up to take care of the Grand Rapids businessmen that didn't allow unions in their plants. He also said, "that if an employee does not pay local union dues, that financial secretary Chuck Rogers has a special number in Pontiac where he will call in a favor." Elrod then asked if his life was in danger and O'Neal replied, "Yes." O'Neal then said, "that they were going to make an example of 'the Mexican,' Tom DeMiro, who just won a settlement in a recent NLRB decision, and that the people who work for the Employer had to pay union dues even if they did not want to." Elrod and Maschke questioned O'Neal on how he found out this information and that Elrod was not paying union dues, and he said, "that he knew about it from being on the Executive Board." Maschke also testified that O'Neal made the above comments in his presence on April 21 and that he telephoned DeMiro on the same day to apprise him what O'Neal had said.

On April 22, both Elrod and Maschke made a report of their conversation with O'Neal to the U.S. Department of Labor, Racketeering Division. Special Agent Jeff Dancer informed them that due to the nature of the complaint, to contact the Michigan Department of State Police and file a complaint with that department. On April 24, Elrod and Maschke went to the state police office but were told to come back on April 28. On April 28, Elrod and Maschke met with Trooper Lee Victorian and Detective Sergeant Albright and related the above conversation that took place with O'Neal on April 21. Additionally, Elrod and Maschke told the police officers that the executive board held a meeting at the Black Lake UAW education facility in northern Michigan, where they were setting up and conspiring against nonpaying union members and the Pontiac Group was mentioned.

On April 30, Victorian and Dancer attempted to make contact with O'Neal at his residence. A message was left with a family member and a meeting was arranged for May 1, at the police station.

Elrod further testified that he had a conversation on May 1, around noon, in O'Neal's office. Elrod asked O'Neal if he was able to get the telephone number for the Pontiac group and O'Neal said, "no." Elrod asked O'Neal whether he thought this is a death threat and they are out to get me? O'Neal, according to Elrod said, "Yes it is." Elrod also testified that O'Neal promised him that he could listen to the tapes that were made of O'Neal's conversation with the police officers.

On May 1, around 3 p.m., O'Neal met with Victorian and Dancer at the police station.

O'Neal cooperated fully and told the police officers that Elrod and Maschke have been acquaintances and friends for the last 30 years. He also said that he tried to explain to Elrod that he should "watch his back" as he was trying to warn Elrod to watch out for Maschke, and that he was afraid Maschke was going to cause Elrod some problems at work that could lead to his being fired. O'Neal further stated that there is no such group as the Pontiac Group but there is a group known as the Grand Rapids businessmen, but this is an entirely different organization that deals strictly with manufacturing with the Employer and has nothing to do with any type of illegal activity. O'Neal opined that he felt that Maschke was "playing Elrod into his favor" to gain more of a political stance when he

attempted to run again as a union official. O'Neal told the police officers, as he testified in the hearing, that the alleged threats are bogus, were never made, and do not exist except fictitiously.

Financial Secretary Charles Rodgers testified that Elrod is paying and always has paid his dues through checkoff authorization. He knew nothing about the collection of dues in Grand Rapids and does not have a telephone number to call to harm people for not paying union dues. Rodgers further testified that while he attended an executive board meeting at Black Lake, it was solely for the purpose of training and discussing internal union business including the collection of dues but no conversations took place concerning conspiring against nondues paying union members.

D. Discussion and Analysis

The General Counsel alleges in paragraph 9 of the complaint that about April 21, Respondent, by its agent Gary O'Neal, at the Ypsilanti Powertrain plant, threatened employees of the Employer (Elrod and DeMiro) with physical harm because they did not pay union dues to Respondent. Additionally, in paragraph 10 of the complaint, the General Counsel alleges that O'Neal confirmed to an employee (Elrod) that the statement described in paragraph 9 is a threat of physical harm.

The subject case solely involves an issue of credibility. If O'Neal made the threats as set forth above, a violation of Section 8(b)(1)(A) of the Act would be established. *Yale New Haven Hospital*, 309 NLRB 363, 368 (1992) (supervisor warning to employee of retaliation by others violates Section 8(a)(1) of the Act, notwithstanding testimony that employee did not believe that the messenger of threat would retaliate against employee).³ Based on my review of the evidence and evaluation of the witnesses' testimony here, I do not find that O'Neal made the statements as alleged by the General Counsel.

First, Elrod testified that O'Neal has never threatened him nor is he aware that O'Neal has ever threatened anyone else. Likewise, Maschke testified that neither O'Neal or Rogers ever threatened him nor did O'Neal ever threaten him with physical harm because he did not pay union dues.

³ In that case, the judge determined that the supervisor made the threatening remarks alleged in the complaint.

Second, I find highly suspect, that Elrod did not immediately inform O'Neal that he was current with his dues obligations after allegedly being told by O'Neal on April 21 and May 1, that he was the subject of a threat of physical harm for not paying dues to the Union.

Third, I do not credit Elrod and Maschke's testimony that O'Neal promised them they could listen to the tapes of his interview with the state police. In this regard, O'Neal credibly testified that no tapes were made of his May 1 interview with the state police, which was confirmed by Trooper Victorian.

Fourth, after completing the interview with O'Neal on May 1, Victorian testified that he felt the threats were vague and he could not find anything concrete. Therefore, he was convinced and placed in his incident report, that the threats may be unfounded and he would probably conclude the investigation into this matter (G.C. Exh. 10).

In summary, I find that O'Neal did not make the statements attributed to him by Elrod and Maschke as alleged by the General Counsel in paragraphs 9 and 10 of the complaint, and therefore conclude that Respondent did not violate Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. General Motors Corporation is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, by its agent Gary O'Neal, at the Ypsilanti Powertrain plant, did not threaten employees of the General Motors Corporation with physical harm because they did not pay union dues to Respondent.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The complaint is dismissed.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.